



Dispute Resolution Commission

**Quarterly Meeting
Friday, September 21, 2018
10:00 AM**

**NC Judicial Center
Raleigh, NC**

The Honorable Judge Webb, Chair, called the meeting to Order.

Commission Members present: Webb, Dollar, Clare, Caldwell, Farris, Hicks, Nease Brown, Ponton, Vincent, Evans, Tyson, Cash, and Long.

Ex-officio members and staff present: Estle, Laney, Leazer, Nesbitt, Schafer, Norelli, Craig, Robinson and Kozlowski.

Guests present: Ketan Soni and

With regrets, Commission Members not present: Marcilliat, Nadolski, Seigle, and Wood.

A quorum was present at the meeting.

Judge Webb welcomed all present, and thanked everyone for attending in light of Hurricane Florence.

1. Introduction of new Executive Director, Tara Kozlowski.
2. Announcement of new Member Laura Isley taking over Ms. Dollar's seat – Judge Webb.
3. Presentation on New Project to Overhaul Record Keeping and Statistics Gathering in the NC Courts – Brad Fowler, AOC Research, Policy, and Planning Officer.
 - a. Current records retention rule is to retain paper files for 60 years. Approximately 31 million pages are added to clerk files each year state wide. Current system, VCAP, is indexing system. AOC looking to move into a case management system, eCourts, with mandatory electronic filing within next 3-5 years. The new system will force standardization of rules, procedures, and forms throughout the districts of NC.
 - b. The DRC will have input on the data to be entered by clerk/staff/judges/mediators regarding ADR. The DRC's direct challenge "what do we want in the new system?" DRC needs to determine things that matter and things that can be measured to create

- work-flow. What does the DRC want to know? The DRC needs to develop uniform agreed-upon definitions.
- c. Judge Webb: Tara to send link to all Members where they can enter the information they want to know. We will form a sub-Committee to look at definitions and work-flow.
 - d. Discussion. The timing, and replacement of VCAP is 3-5 years. The total cost estimate for the project is 15-18 million, with 1.5 million current secured. This project is moving forward with the anticipation the funding will be there as needed. Data migration is expected, basic VCAP information will transfer over. All historic records will be preserved.
4. Announcement Regarding Green Book – Mr. Laney
 - a. There has been a request to translate a portion of the Green Book into Russian.
 - b. Nease Brown made a motion to allow a portion of the Green Book to be translated into Russian. Tyson seconded the motion. Vote -all members in favor. Approved.
 5. Approval of May Minutes – Judge Webb
 - a. Nease Brown made a motion to approve May 2018 meeting minutes. Vincent seconded. Vote - all members in favor. Approved.
 6. Introduction of Deborah Malizia – Judge Webb
 - a. Deborah Malizia and Dr. Jameson authored the research article “Hidden in plain view: The impact of mediation on the mediator and implications for conflict resolution education,” published in the March 2018 edition of *Conflict Resolution Quarterly*.
 - b. Deborah Malizia, presented her work, done in conjunction with Dr. Jameson at NC State, and Dr. Amy Halberstadt at NC State, on a research project evaluating the impact mediation has on the mental health of the mediator. The group received IRB approval from NC State for one year, and launched a pilot study with law students to determine if a mediation course has an impact on the student’s mental health. Currently there are five schools participating in the research project this fall and three more are scheduled to participate this spring. However the number of student participants is lower than the group had hoped.
 - c. Ms. Malizia requested assistance from the DRC in funding the research project by providing a \$50 stipend to each participant, \$1500 for a statistician, and funds to pay the final charge of 27% of the cost of the study to NC State for their support.
 - d. The group is also soliciting other sources and looking to other avenues for funding, including the CJCP.
 - e. Webb – the DRC does not have the funding in its budget to assist, but the DRC will endorse the project. Webb opened up to the floor for discussion, no comments.
 - f. Nease Brown made a motion that we received the report and encourage CJCP and other sources to support the research project. Evans seconded. Vote – all members in favor. Approved.
 7. Introduction of Judge Nancy Norelli Black, New Liaison from NC Dispute Resolution Section – Judge Webb.
 8. Hiring of third staff member – Judge Webb

- a. Webb advised when talking to Ratliff about hiring new Executive Director, she brought to his attention the need for a third staff person to assist in covering the day-to-day calls, vacation and sick leave. Webb confirmed with Robinson that a third staff member is needed. Webb requested a vote for a third staff person be held at the end of the meeting.
- 9. Presentation of Plaque to Ms. Dollar – Judge Webb
 - a. Dollar has been a member of the Commission since 2012, and has been vice-chair since 2014. Judge Webb commented it would be hard to replace her knowledge, hard work and friendship. Applause all around.
- 10. Office Report – Mrs. Kozlowski
 - a. Mediator certifications issued for the end of the 2017-2018 fiscal year – as of June 30th: 1171 MSC active; 69 MSC inactive; 340 FFS active; 18 FFS inactive; 141 CMP active; 7 CMP inactive.
 - a. FY 2017/18 Budget Report Total expenditures for the year were \$175,981.00, which included \$156,035.00, for salary and benefits of staff. Revenues for the year totaled \$206,055.00, leaving a cash surplus of \$30,073.00 for the year. This is the first year since 2013 the Commission has had a surplus at the end of a fiscal year. The total carryforward as of June 30, 2018 is \$103,015.40.
 - b. Tentative Report on FY 2018/19 Renewal Period. We have collected \$103,640.00 thus far during this renewal period. Last year at this time we had collected \$106,315 so we are down \$2,675, but Florence may have had an impact on this number. There is \$93,660 in potential renewal fees in the holding tank, and we are receiving increased payments from trainers and application processing fees.
 - c. Laura Isley, recently appointed to take over Lorrie Dollar's seat. The State Board of Elections and Ethics Enforcement sent a letter approving Ms. Isley's appointment. The following language was read into the record: **We did not find an actual conflict of interest, but found the potential for a conflict of interest. The potential conflict identified does not prohibit service on this entity.**
 - d. We have not submitted rule change requests to the Supreme Court, and staff recommends dropping the requirement to send via Certified Mail as it is problematic. Staff recommends using the AOC overnight delivery method.
 - i. Discussion held and concerns about notice and due process. Matter left on the table with no resolution.
 - e. Staff is requesting new laptops and monitors for the office. The current versions are old and all warranties are expiring. AOC is replacing computers throughout, and we should as well. Laptops cost \$1000/ and monitors \$130/. Laptops are better than desktops to allow for staff to work from home during inclement weather.
 - i. Webb requested to vote on this at the end of the meeting.
 - f. A reminder to all members whose term is coming to completion, you are still in the position until your replacement has been appointed and sworn in. The Chief Justice is aware we are in need of the new appointments.

- g. Staff requests for members to notify us if they would rather receive electronic copies of the meeting packet to review and paper copies when they arrive to avoid mailing.
 - h. Notice that all brochures will be translated into Spanish – Robinson currently working on this project.
 - i. Annual report is in the works but not complete as of yet.
 - j. With the assistance of Dollar, staff is looking to make short videos of information to members – such as AO's - to avoid sending long articles that may not get read.
11. Legislative Report – Mr. Laney – nothing to report.
12. Long Range Planning Committee – Lorrie Dollar
- a. Committee working toward bringing all FFS mediators under DRC. Given the number of FFS mediators, there is a greater perception by the public that we cover all family mediators and we need a safeguard in place for the litigants. The goal is to take our time to bring in all FFS mediators, and grandfather mediators with a certain level of experience. Those coming in under a grandfather clause will be required to take specific training relating to the rules, mechanisms and AO's.
 - b. Discussion. All programs should have the same expectations, FF is no different. Public perception is DRC already has authority over all FF mediators. Must be done slowly. Resistance by the family bar appears to have decreased, and the feeling is the family bar has become comfortable with becoming certified.
 - c. Webb – Ponton and Norelli to be ad-hoc Committee to find a way to implement. It is important to be transparent in this process. Once we have a proposal we will contact the chief for support.
13. Clerk Mediation Pilot – Ms. Nesbitt
- a. The maximum number of CMP cases in a year has been 13 out of all 100 counties. Since the pilot was implemented in March of this year, in only 4 counties, the number of CMP cases has increased to 23 cases. It's a start.
 - b. Discussion. Clearest indication is in the numbers, this is real progress. It is important for clerks to make sure their judges are aware of the program. If the judges are aware, they will be more willing to use the program.
14. New Media – Mr. Clare
- a. New website is up and running. Hard to follow and navigate through.
 - b. Discussion. Offer from Judge Warren to use IT person, Ratliff declined. Ratliff spent a month organizing and putting website together, however much of the information was left off the site. AOC IT made an excel spreadsheet showing all missing data – we are trying to fix. There was no opportunity to review the website before it went live. IT is looking to modernize the renewal application. Staff has carte blanche to fix sit as necessary.
15. Ex Officio reports
- a. Mediation Network – Ms. Estle. Network has not had a meeting since last DRC meeting. Ms. Estle's center has expanded into Johnston County. Still no Executive Director for the Network.

- b. Court Staff – Ms. Craig. Fall conference Oct 23-26, invitation to Kozlowski and Webb to join conference if available.
 - c. NCBA Dispute Resolution Section – Judge Norelli. We are videotaping a mediation to use as a demonstration for observations on 10-15-18. Ann Anderson is spear-heading this project. There have been suggestions for a FFS training video as well, the section will consider this after receiving feedback from MSC video. We have had one meeting this year, Robinson, Ratliff and Kozlowski attended. We have an annual meeting in March in Charlotte with a slot for the DRC ED to speak at the event.
 - d. Industrial Commission – Mr. Shaffer. The settlement rate for mediations in the 17/18 year was over 75%. The number of mediation conferences held steady, just under 10k even through the number of cases sent to mediation had declined slightly. Next month is the educational conference, all are looking forward to robust conversations.
 - e. Court of Appeals – Judge Tyson. 13 appellate mediations completed this year. Losing three of the most experienced mediators – two at the end of the year, and one next April. We have a meeting on November 1st to discuss the issue of requiring all appellate judges to mediate cases. There has been discussion of having new judges complete a one-day training. Judge Tyson would prefer them to complete 40 hour training and become certified through DRC. Judge appellate mediators do not charge a fee.
16. Update on November retreat – Ms. Robinson. The hotel took in some damage from hurricane Florence, but will be up and running by our retreat. A reminder email will be sent out.

Webb and Dollar excused themselves to attend to other business, Hicks to act as Chair for remainder of meeting.

Break for Lunch

17. Mediation Training and Certification Committee – Mr. Long.
- a. We have had a good response for renewals, people like the free CME's and we have heard positive feedback.
 - b. We have a new 40-hour FFS training program in Charlotte by RSR. Ms. Gelbin has been approved for a 16-hour flip in her MSC training course. She has also submitted a proposed 40-hour, and 16-hour, flip training manual for FFS that is currently under review.
 - c. We have a series of 2-hour CME's that have been approved: Review of Rules and Recent AO's; By the Book: Avoiding Trouble Spots in your Mediation Practice; Ethics & Continuing Mediator Education; and Mediation Ethics Family Feud.
 - d. One application for a 2-hour CME was denied as the program discussed rules that had not yet been adopted by the Supreme Court.
18. Ex-officio report on statistics – Ms. Nesbitt.

- a. MSC number of cases ordered over 6k, all issues resolved was 1943, so we are at almost 1/3 of cases where all issues are resolved in mediation. 585 cases settled prior to a settlement conference. Half the cases are being settled before or during mediation.
- b. FFS the number of cases ordered in was slightly down from 16/17 year. However, in 16/17, 42% of the cases were all or partially resolved, this year it has increased to 44%.
- c. Arbitration. The number of cases heard was 1958, out of 4,000 cases. Trial de novo was only 502 cases. Less than 10% of cases noticed for arbitration went to trial or jury trial.

19. Grievance Committee – Judge Vincent.

- a. This Committee has been busy. We denied a request for certification as applicant was suspended from the Bar in Florida. He has applied to the NC Bar, but has not been admitted. Three applicants with history of minor criminal offenses in the past, bankruptcy, and/or tax liens were all approved after verifying no all issues have been cleared up and all are in good standing, if admitted to a Bar.
- b. McDaniel has caused such problems: He did not comply with the requested terms and has been suspended. Discussion: He did meet with Judge Hudson, but did not come into compliance with remainder of requests.
- c. A complaint was filed in WC claim. Chair dismissed with staff recommendation, mediator received letter of warning about public perception. Complaint was appealed, appeal was denied by full Committee.
- d. There is a current complaint pending, staff is working on gathering information.
- e. DRC meeting in May of 18 – discussion was held regarding how to handle non-response to complaint from DRC. The Grievance Committee met and determined staff needed support, they propose adding the following language “if a mediator fails to respond to a Complaint within the 30-day period of time, the matter will automatically be referred to the Grievance Committee.”
 - i. Discussion. There is a need for a compliance mechanism, it needs to be a credible threat. Would the Committee consider the following: “even without a meritorious allegation, no response to the underlying complaint may be grounds for suspension.” Concerns were expressed about mediator’s being blind-sided if not aware of the complaint. Staff noted they would call and follow-up prior to expiration of 30 day period. Staff to work with Committee to draft language for next meeting.

Robert Ponton excused himself from the meeting.

20. Standards and Advisory Opinion –Rule 7 - Mrs. Kozlowski standing in for Ms. Seigle.

- a. Rule 7. This rule has been on the table for a while. A draft re-write was approved at the February 2018, meeting, and posted for comment. A lot of comments were received, most expressing concern on the notice of the parties inability to pay. At the May 2018, meeting the Members requested the matter go back to the drawing board. The S&AO Committee met with the Grievance Committee in August and developed the current proposed draft. The current proposed draft allows for early

notice of the inability to pay, as the party seeking relief shall file the Petition of Inability to Pay the Mediator Fee within 21 days from the date of the Order to Mediate in MSC matters, and prior to the Scheduling Conference in FFS matters. This will then trigger the court to appoint a mediator from the court appointed mediator list. If a party to a mediation wishes to file a Petition to avoid the mediator fees, they lose the ability to party-select a mediator. The rule now places the burden on the party seeking relief from the mediator fees to file the Petition. Thus the mediator is no longer required to file any paperwork on behalf on the parties.

- b. Discussion. Ratliff Memo Surveying Other States' Rules on **Indigency** and Conflicts of Interest. Positive reaction to party filing their own petition and not the mediator on behalf of the party, esp. as not all mediators file paperwork timely. Concerns about putting extra burden on judges when a party doesn't file the paperwork correctly. Need to clarify whether there is a hearing or not on the ability to pay, the mediator is to go forward with the mediation. Concerns that party who files petition cannot select a mediator even if mediator agrees to take pro bono – staff advised this was not intent, and a party can select mediator but will just not be able to seek relief from court – need to clarify. Concerns were expressed that not all counties use the same forms, so trying to implement will be a problem. A question was raised as to why this is even an issue if an award has been generated through mediation. Agreement that is a party settles and receives an award, they then have the ability to pay. It was acknowledged that if a conference ends in impasse then a party may not be able to pay. Agreement by all members that the responsibility to file the Petition should be on the party and not the mediator. Discussed how a party is supposed to learn they need to file the petition, what happens if they are not told, is it the mediator's responsibility to inform the parties they can file? What is the obligation of the mediator? Staff reported the office receives calls often regarding the inability to pay, and the information is provided by our office. Mediators also call staff upset they are not getting paid, and are advised they agreed to take pro bono cases when they became certified. Concerns were raised about a situation where someone does not know how to proceed. Need to know who (judge/staff/mediator) tells what. Comments were made that people are not going to read regardless. Concerns were expressed mediators would not take pro bono cases if not required. Court appointed lists are diminishing.
 - c. The Committee and staff to re-consider the issue. All members agreed the party without the ability to pay should be responsible for filing the petition, and that notice to the mediator is very important. There also needs to be clarification a party can still party-select a mediator even though no ability to pay if mediator agrees to take case pro bono.
21. Standards and Advisory Opinion –Other matter previously before Commission - Mrs. Kozlowski standing in for Ms. Seigle.
- a. Revised Standard III in lieu of previously proposed AO 36 on Confidentiality and New Lawyer Hire. Two different mediators posed related scenarios to the Commission and both requested AO's. The scenarios both involved mediations

ending in impasse, where a litigant either changes lawyers or hires a lawyer for the first time. The current Standard III.A prohibits the mediator from communicating with the new attorney in both situations. The Commission posted AO 36 for comment, answering the communication was prohibited in both scenarios. We received multiple comments and concerns about the need for ability to communicate in these circumstances. At the May 2018, meeting, the Committee suggested best practice would be to modify the Standard. The Committee met with staff and drafted additional language for Standard III that would allow this type of communication. The new language allows discussions to occur between the mediator and a new lawyer to a case so long as all parties consent and the mediator feels comfortable in their memory and can preserve confidential information.

- i. Discussion. If all parties consent the mediator is not put in much jeopardy. We are here to settle cases so why have an absolute bar on this. A mediator should be able to bring attorney up-to-speed. Concern was expressed that other attorney hold too much power by having ability to withhold their consent. Concerns this creates situation where other party has incurred costs since last offer that may have been time specific. Counter comment was for no concern is there is a time limit, but concerned about having to rely on client to obtain all information.
 - ii. Motion to adopt Standard III revision by Cash. Seconded by Caldwell. Vote – all members in favor. Approved.
- b. Revised AO 37 on Food and Beverages. A mediator contacted the Commission asked whether Standard VII.H would preclude her sponsoring a CME or CLE offering and being recognized for doing so on program registration or other materials or on a sign. Second, the mediator asks whether she could sponsor a dinner or open bar at a CLE or CME event and be recognized for doing so. The original AO denied the ability to sponsor a dinner or open bar. The AO was posted for comments, and we received a comments recommending limiting the sponsorship. After discussing the matter with the full Commission at the May 2018, meeting, and taking into consideration the comments, the Committee has revised its position and drafted the proposed AO to allow for mediators to sponsor CME and CLE events, and provide food and beverage, if they so wish. The CLE and CME event would need to be for educational purposes and open to the public.
 - i. Discussion. Open to the public does not mean free. It was suggested to change “open” to the public to “available” to the public.
 - ii. Motion to adopt AO 37 with the change from “open” to “available” by Judge Evans. Seconded by Nease Brown. Vote – all members in favor. Approved.
- c. Revised AO 38 on Designation of Mediator (completion and filing of form). This AO addresses completing the Designation of Mediator Form as defined in MSC Rule 2.A. This AO was before the Commission earlier this year, and was approved. AO 38, states Rule 2.A does not allow for the responsibilities for completing the Designation of Mediator Form to be delegated to the mediator selected, or any third

party. The AO was posted for comment. We received a comment from Mr. Jason James making us aware that potentially mediator services were pre-populating the Designation Forms with information prior to sending them to the attorneys to file. As such, AO 38 has been revised to address this issue. The language has been modified to define “completing” and clearly state a mediator may not complete, sign or file these forms.

- i. Discussion. Suggested to delete “mediation firm” and include “or anyone acting on behalf of mediator.” Concern about how to police this, response that is not the issue.
 - ii. Motion to adopt AO 38 with change from “mediators and mediation firms,” to “mediator, or anyone acting on their behalf,” by Clare. Seconded by Judge Farris. Vote- all members in favor. Approved.
- d. Revised AO 39 on Evidence for Attorney’s Fees. We received an inquiry asking if offers made and rejected in mediation be used later in the same action to support a motion of attorney’s fees, and may the mediator’s notes related to offers and counter-offers be subpoenaed and used as evidence for the same purpose? This AO was presented at the last Commission meeting, answering NO to both matters. The AO was approved by the Commission pending an additional revision. The language has been modified, and approved by the Committee and is awaiting final approval by the Commission.
 - i. Discussion. None. Motion to adopt AO 39 by Nease Brown. Seconded by Clare. Vote – all members in favor. Approved.

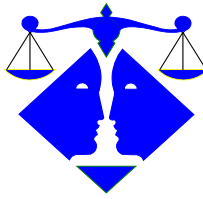
Judge Vincent excused herself from the meeting. Meeting quorum was maintained.

- e. Discussion of FFS Conflicts of Interest Scenarios, State Bar Inquiry Question (Re: AO 31). This deals with the inquiries where the attorney/mediator has contact with a party to a mediation prior to the mediation. Can an attorney/mediator who was interviewed by a party, but not hired, or who represented a party in simple divorce, later conduct a mediation of a family dispute for the same party? The Committee believed that both scenarios violated the current Standard as the Standard is currently written.
 - i. Staff - Ratliff polled seven other states regarding their rules and regulations on conflicts of interest. We are the only state that does not allow a knowing and intelligent waiver in any circumstance. A few of the states have very broad language, while other states are more narrow, however all states have a catch all provision that even with a knowing and intelligent waiver by both parties, a mediator must decline if the conflict is too great.
 - ii. The SAO Committee presents multiple approaches on how to address these scenarios.
 1. Proposed AO 40 interprets Standard VII.C as prohibiting both mediators from conducting these mediations, even if the parties give a knowing and intelligent waiver in writing.
 2. Proposed revisions to Standard VII.C reflect Mr. Long’s concerns and would permit the mediators in these scenarios to serve, provided

that the parties have given a knowing and intelligent waiver in writing. The rule revision was drafted in a broad manner pursuant to rules our surrounding states already have in place.

3. Alternate Proposed revision to Standard VII provides a re-write to the entire rule 7. The proposed re-write was presented to the Committee to assist in clarifying the language within the rule.
 4. Seek guidance from the State Bar and request an Ethics Opinion. It has been brought to the Committee's attention this issue is somewhat similar to the one addressed in AO 31. AO 31, and also AO 28, speaks to the issue of a mediator being barred from drafting an agreement at the conclusion of a mediation. These scenarios deal with the conflict coming from actions prior to the mediation. However, the Committee felt although the scenarios' are different, they are close enough to possibly warrant seeking guidance from the State Bar.
- iii. Discussion. Rule 1.9 Knowing and Intelligent Waiver was discussed. No issue going through State Bar is completed in a timely manner. Re-presented parties are not typically the problem, but pro se individuals can create an issue. The few times a Member had not recused himself and all parties agreed to have him hear the matter, came back to bite him. It is always a problem and the Member now has a bright line rule against this. State Bar Ethics Committee is meeting in October and their agenda is set, if this Committee is to hear the issue it will not be discussed until January. Staff is to call State Bar to see if issue can be addressed by State Bar Staff and not full Committee.
 - iv. All agree Staff is to call State Bar and draft letter seeking opinion on matter.
22. Standards and Advisory Opinion – New Matters Before Commission - Mrs. Kozlowski standing in for Ms. Seigle.
- a. This AO addresses some reoccurring issues that mediators seem to have with case management. Specifically, this AO speaks directly to the McDaniel suspension. The intent of this AO is to provide an outline of the mediator's requirements so they can manage their active cases more effectively. The ancillary benefit is to show the consequences of failing to follow proper procedure pursuant to the Rules and Standards.
 - i. Discussion. Propose to remove language that it is rare for the Commission to take action, and just list that it is extreme. Delete commentary that staff rightly resents badgering mediators to keep AO matter of fact. Proposal to include that the failure to respond will be automatic referral to grievance Committee – however can't make that change if it modifies a rule, but can make the change if it is just a policy change.
 - ii. Motion to adopt AO 41 with proposed language changes by Tyson. Seconded by Nease Brown. Vote – all members in favor. Approved.

- b. Partition Inquiry. The office received a call from a mediator asking about the mediator's obligation to notify all parties whether she is a MSC mediator and/or a Family Financial mediation prior to a mediation. The mediator is FFS certified. She was party selected to mediate a partition action as the parties to the action were dealing with a separation (not married). The mediator did not disclose that she was not MSC certified, nor was she asked about her certification by either attorney. A Superior Court action had been filed, but had not yet been ordered to mediation. She mediated the case which ended in an impasse. The parties were then ordered into mediation with a MSC mediator. One of the parties was upset about the need to go through the process again. The mediator was contacted by the attorney of the distraught party and let her know she should have disclosed that she was not MSC certified. This office provided guidance to the mediator, documented in an email.
 - i. Discussion. If you are not a certified MSC mediation, the mediator should have the duty to tell the parties requesting the mediation. This matter should go through the Grievance Committee— advised the matter was self-reported. Proposal for letter to mediator regarding best practice. Staff advised Ratliff had sent letter to mediator advising best practice is to provide notice of certifications to parties. Commission all agreed this resolved the issue and no AO was needed.
- 23. Re-visiting earlier items on the agenda.
 - a. Hiring third staff member.
 - i. Discussion. There have always been three people in the office. Amazed at how much work comes out of the office, both part time staff are likely working in excess of their required hours. A third person seems reasonable.
 - ii. Motion to hire third staff person for part time admin position by Long. Seconded by Cash. Vote – all members in favor. Approved.
 - b. New computers and monitors for staff.
 - i. Discussion. None. Motion to purchase 3 new laptops with 24” monitors for staff by Clare. Seconded by Long. Vote – all members in favor. Approved.
- 12. Adjournment – Ms. Hicks.



Dispute Resolution Commission MINUTES

**Friday, May 18, 2018
NC Judicial Center, Raleigh NC
10:00 AM**

Members present: Nease Brown, Cash, Dollar, Hicks, Long, Marcilliat, Nadolski, Seigle, Tyson, Vincent, and Wood. Ex-officio members and staff present: Estle, Leazer, Nesbitt, Ratliff, Robinson, and Schafer. Guests present: Burns, Craig, Harrington, Igou, Kozlowski, and Little.

In Judge Webb's absence, Vice-Chair Dollar welcomed everyone and asked those present to introduce themselves to the Commission's new member District Attorney Patrick Nadolski (District 15A, Alamance County). She noted guests, including two affiliated with the Mediation Network of North Carolina. Next, Ms. Dollar called for Mr. Nadolski to take the oath of office. Ms. Ratliff noted for the record that the State Board of Ethics Enforcement had reviewed Mr. Nadolski's Statement of Economic Interest and found no actual conflict of interest or the likelihood of a conflict and that, as such, nothing prohibited his service on the Commission.

Ms. Dollar updated everyone regarding the court's new website. She reported the rollout was still on target for June 19. She added that the site will be user friendly, particularly with regard to mobile devices. She noted that the court will be stressing information like caseload statistics. She also noted that eCourts and eFiling are expanding and mentioned various scanning apps that could facilitate the filing of Reports of Mediator with the court. She suggested that the mediators in the room should take a look at those apps. Ms. Ratliff and Ms. Robinson said they will be showcasing those apps in the next edition of the newsletter.

Next, Ms. Dollar asked Ms. Nesbitt, who needed to leave early, to report on the Pilot Clerk Mediation Program. Ms. Nesbitt said she was pleased to report that the pilot is now underway in Ashe, Buncombe, Mecklenburg, and Wake Counties. Next, she spoke about program caseload statistics. She first reported that 4,852 cases were submitted to the District Court Arbitration Program. She noted this is a higher number than last year, so that Program was growing. She further reported that 2,552 family cases were referred to the FFS Program and that number was stable relative to last year. Lastly, she noted that 5,877 cases were referred to the MSC Program. That number had fallen the past few years. Ms. Nesbitt noted that she is concerned about mediator reporting. She described a recent call she received from a TCA who told her that reports were not being filed in 60-70% of her MSC cases. Ms. Leazer and Ms. Craig echoed the same concerns and suggested that court staff did not feel supported by the Commission and were tired of having to spend time calling and emailing mediators about their tardy reports. They suggested that some court staff were beginning to question whether they should bother to collect statistics. Both Ms. Dollar and Ms. Ratliff reported that they were hearing similar sentiments from other court staff. Ms. Nesbitt suggested that the Commission needs to be more adamant that mediators get their reports in on time. She stressed that these statistics are the only concrete way to establish

that Programs are working. Ms. Seigle added that she, too, is concerned about reporting. She suggested mediators should not be permitted to mediate further if they are behind. Judge Cash suggested the issue is more complicated than it appears; mediators are sometimes waiting on attorneys and don't want to alienate them at the risk of losing future business. Ms. Seigle asked Mr. Schafer whether the Industrial Commission has a similar reporting problem? He responded that they do, but not to this degree. He personally contacts mediators and advises them that they cannot mediate further if they are behind. Ms. Leazer noted that she has heard from some court staff that they are no longer accepting Designations which name mediators who are not current. Ms. Dollar suggested establishing an ad hoc committee to look at the reporting issue. The Commission agreed. Judge Vincent suggested that the Commission may want to specify that a certain number of failures to report will automatically trigger a grievance.

Next, Ms. Dollar called for approval of the February, 2018, minutes. They were approved. She next asked for Ms. Ratliff's office report. Ms. Ratliff noted this has been a busy quarter, especially given that she had "lost" most of the month of February editing the website. She noted that the Commission's website consisted of 125 web pages. She reported that she culled some, though not a lot of pages, and, for the remaining pages, had focused on reducing text and prioritizing information based on constituent interest. In keeping with the consultant's directives, she incorporated more bullets, headings, and subheadings. She said she felt good about what she had done and had received positive feedback from AOC staff. She said she still did not know how the material on the Commission's website would be grouped or organized. She added that while the main rollout was scheduled for June 19, she had been advised by AOC Communications staff that the roll out for commissions and other ancillary programs may be slightly later. Ms. Ratliff next reported on the temporary Tech position that Judge Webb had spoken about at the last meeting. She said she completed the paperwork that HR required. She noted that she and/or Ms. Robinson had met with AOC Security, IT, and Communications staff regarding the Tech. She reported that both she and Ms. Robinson were advised that the tasks the office wanted undertaken by the Tech, i.e., addressing spamming and phishing concerns and ensuring the functioning of the interface between the new website and the database and online renewal application (which are not part of the website) could be handled by exiting AOC staff who were already working on the issues. Moreover, it was suggested to Ms. Ratliff and Ms. Robinson that the Commission would have to pay for the Tech position, if it chose to go that route rather than utilizing existing staff. Ms. Ratliff reported that she referred AOC staff to Judge Webb for clarification as to any additional tasks he might want the Tech to tackle and to address the cost issue, i.e., whether someone would be brought in or the AOC would assign existing staff to the Commission. She said she understood that Judge Webb had contacted Judge Warren, but did not know what had happened beyond that.

Next, Ms. Ratliff reported that after she completed the editing of the website, she turned her attention to the Pilot Clerk Mediation Program. She noted that program forms had to be revised in keeping with directions from pilot clerks and there were edits to the Benchbook as well. She passed around the final version of the Benchbook, forms, and flow chart and noted that these materials represented a major effort on the part of staff. She added that she had already had some calls from clerk staff, mediators, and parties regarding referrals so she felt like things were starting to move. Next, Ms. Ratliff reported that she turned her attention to personnel matters. She said that she had completed the paperwork necessary to begin advertising the Executive Director position and the job had been posted. She added that Ms. Hicks would have more to say in her report for the Ad hoc Staffing and Funding Committee. Next, Ms. Ratliff noted that she and Ms. Robinson were gearing up for the 2018/19 renewal period. She added that steps taken to improve security would be discussed during the report of the New Media Committee. She added that given that the website rollout was on June 19 and the Renewal period begins July 1, she was concerned that there was not a lot of time to ensure that the interface between the new website and the database and online renewal application were seamless. Ms. Robinson noted that the Commission may also be transitioning to a new website address, www.ncdrc.gov,

which may cause confusion. Ms. Ratliff noted that she and Ms. Robinson have raised their concerns with the appropriate IT, Security, and Communications staff and been assured that they are on top of things. Lastly, Ms. Ratliff noted that both the Grievance and SAO Committees had kept the staff busy this quarter. Ms. Ratliff added there was one task she had not gotten done this quarter --she had not forwarded the rules adopted to date to the Supreme Court. She explained that there had been comments on the proposed MSC/FFS Rule 7 changes and Ms. Seigle had wanted the matter back before the Commission. Moreover, she added that she and Mr. Laney were still trying to clarify with the Supreme Court whether the ADR Committee of the State Judicial Council and the State Judicial Council were still functioning and should receive the proposed rule changes.

In Mr. Laney's absence, Ms. Ratliff called attention to his written Legislative Report on the General Assembly's ongoing effort to address the difficult issue of homeowner/homeowner association disputes. She noted the report suggested this might be a matter the Long Range Planning Committee could explore.

Ms. Estle, who also needed to leave early, gave her liaison report for the Network. She indicated that there was general agreement among the centers that they all needed to participate in the DCC Program. She added that the Network had agreed to recognize Piedmont Mediation Center as the Network's official trainer for purposes of the DCC Program and she said she expected the Commission's office would begin receiving more applications in the near future. Ms. Ratliff asked for clarification regarding Mr. Minor's role and Ms. Estle responded that he was no longer involved with the Network beyond the Medicaid Mediation Program.

Ms. Dollar next asked Ms. Seigle to report on the comments she received regarding the proposed MSC/FFS Rule 7 changes (indigency). Ms. Seigle noted that 7 comments were received and she briefly summarized each. She then called attention to proposed additional revisions. The new revisions permitted parties or the mediator to forward the Petition for a finding of indigency to the court. (The previous revisions had placed the responsibility to forward the Petition solely on the mediator). There followed spirited discussion regarding how to address parties seeking a determination of indigency. Judge Tyson is concerned that this Rule invokes the notion of involuntary servitude as it requires mediators to serve without pay. Mr. Long echoed that concern. Judge Tyson is also concerned that judges will have to spend time making these determinations. Ms. Nease Brown suggested that perhaps a balance needs to be struck. Judge Cash suggested that the Commission make an effort to find out how often such Petitions are being filed around the State. Judge Vincent suggested maybe the Petition should be beefed up to ask more questions about the parties' inability to pay. Mr. Little suggested that the real issue is notice, should the mediator get notice earlier? Ms. Seigle responded that she thought the whole idea behind the Rule was to protect mediator neutrality and the perception of neutrality by having the party wait till after mediation to file the Petition, i.e., if a mediator did not know of the claim until after the conference was held, s/he could not rush the conference or refuse to hold it. Mr. Little acknowledged that was the original intent, but said that he no longer believed that would happen. Ms. Seigle asked whether the Grievance Committee had not recently disciplined a mediator on those very grounds? Judge Vincent nodded that was the case. Ms. Ratliff said that court staff had told her that they think parties equate mediation fees with filing fees which are easily waived. Ms. Leazer and Ms. Robinson suggested attaching a copy of a Petition to the order of referral, though that would require more effort from court staff. Mr. Seigle agreed to table the matter for now and to discuss it further with her Committee. The Committee will make an effort to explore how widespread claims of indigency are and to consider beefing up the financial questions on the Petition.

Ms. Dollar reported for the Executive Committee and noted that a number of members' terms would be expiring on September 30, 2018.

Judge Vincent next reported for the Grievance Committee. She highlighted the issues the Committee dealt with this quarter. She first noted two applicants for certification who were before the Committee on conduct matters. The first, an applicant for FFS certification, had 3 misdemeanors as a youth and young man, domestic violence charges, and a social work license that was suspended due to substance abuse issues. That suspension was stayed for some seven years. Judge Vincent noted that the applicant's license was fully restored in February of 2018, so the Committee certified him. A second MSC applicant had substantial federal tax liens and judgments. The mediator's financial problems were traceable to the Great Recession and the Committee determined to certify him. Judge Vincent next spoke about a complaint filed by a party against a mediator. The party listed a number of allegations against the mediator. Judge Vincent said that, after a full investigation, including speaking with the complaining party's attorney at length, staff could find no corroborating evidence. The Committee dismissed the complaint.

Judge Vincent next spoke about a DRC staff complaint filed against an MSC mediator. She noted that Ms. Ratliff had filed the complaint after being contacted by three different court staff in three districts over a two-week period. All staff were highly frustrated and characterized the mediator in question as having long-term, chronic problems both with reporting and meeting deadlines. Judge Vincent added that staff in one district had told Ms. Ratliff that the mediator had ignored her SRSCJ's request that he meet with him to discuss reporting concerns. All three districts advised Ms. Ratliff that this mediator conducted a substantial number of mediations. Ms. Ratliff, Judge Vincent reported, originally sent a letter to the mediator on February 2, 2018, asking him to "immediately" contact her and the court staff and SRSCJ identified in her letter to address case management concerns. The mediator responded with a brief email, saying he would be in touch with Ms. Ratliff, but never followed up. Two weeks later, Ms. Ratliff contacted court staff and learned that only one had heard from the mediator. At that time, she also learned the situation was deteriorating and one of the districts was refusing to take additional Designations naming the mediator and another was requiring attorneys to name another mediator in cases assigned to the mediator in question. She also learned that a fourth, very urban district was having similar problems with the mediator. At that time, Judge Vincent reported, Ms. Ratliff determined to file a staff complaint against the mediator (DRC Rule IV.B(3)). The complaint was filed on February 15, 2018, and Judge Vincent reported that the mediator never responded. She added also that he never met with the SRSCJ and was not fully caught up in any of the districts, though he had made a substantial effort in one. Judge Vincent reported that her Committee determined to suspend the mediator's certification for one year, but stayed the suspension for 45 days to permit him to meet certain conditions. There followed a lengthy, spirited discussion of this matter. Judge Tyson and others wondered why the suspension was stayed given the mediator's failure to respond to either the DRC staff complaint or the SRSCJ and noted the State Bar would not have permitted a lawyer to continue to practice under these circumstances. He suggested the DRC Rules should provide that a mediator who fails to respond to a staff or other complaint will be suspended automatically. Judge Vincent asked Ms. Ratliff to take a look at the State Bar Rules on this point and get back to the Committee. Judge Cash noted that MSC Rule 6.B(4)(d) permitted SRSCJs to sanction mediators who failed to report. Ms. Ratliff noted that she had contacted the School of Government and been told emphatically that it was not good policy to encourage judges to play a regulatory role for a number of reasons, including the need for consistency across the State. Mr. Little noted that judges had concurrent authority with the State Bar over attorneys. Judge Vincent responded that judges almost never exercise that authority. Moreover, she stressed that the General Assembly and Supreme Court had named the Commission as the regulator. Judge Tyson asked whether the mediator had been reported to the State Bar and Judge Vincent responded that he had not. Ms. Leazer noted that a lot of time had lapsed since court staff originally brought the matter to the Commission's attention and the initial letter was sent by staff on February 2, 2018. She was very concerned that this mediator was still mediating and she felt sure many court staff would share her concern. Staff, she insisted, should not have to contend with this kind of behavior. Judge Vincent noted that her Committee would meet as

soon as possible after the 45-day stay expired. She added that they would discuss contacting the State Bar and that the punishment would be public and districts notified.

Judge Vincent next reported on a second staff complaint filed this quarter against an MSC mediator. In 2015, Ms. Ratliff was asked by court staff in 19B to contact a mediator who was signing and filing Designations naming herself as the mediator. Judge Vincent indicated that Ms. Ratliff told the Committee that her notes indicated that she had contacted the mediator by telephone and explained that MSC Rule 2.A required a party or attorney to sign and file Designations. The matter was resolved and the mediator said she would sign no more Designations. However, this year, two additional court staff contacted the Commission about the same mediator signing Designations. The mediator responded that in 2015, she had understood court staff in 19B and Ms. Ratliff to have been referencing a local rule, i.e., that MSC Rule 2.A was a District 19B local rule only. Moreover, she suggested this was a widespread practice which attorneys favored. The Committee determined to issue a Letter of Warning to the mediator. Judge Vincent added that the mediator had requested should she be disciplined, that the Committee consider either revising MSC Rule 2.A to permit mediators to sign Designations or to issue an AO clarifying that mediators may not complete, sign, and file Designations. Unless the Committee took such action, the mediator insisted that she would be at an economic disadvantage relative to other mediators engaged in the practice. Judge Vincent asked Judge Cash to report on a recent survey of court staff regarding Designations. He revealed that this is not a widespread practice. In light of that information, Judge Vincent said that, unless others disagreed, she did not believe MSC Rule 2.A should be revised and called attention to proposed AO 38 clarifying that the practice violated Rule 2.A. Thereafter, following discussion and with a slight revision, AO 38 was approved for posting.

Ms. Seigle next gave the report for the Standards and AO Committee, noting that her Committee had received several requests for Advisory Opinions this quarter. She first called attention to proposed AO 36 and proposed revisions to Standard VII.C, Conflicts of Interest. She explained that these were alternate and mutually exclusive means of addressing two scenarios raising conflict of interest questions under current Standard VII.C. In the first scenario, a family lawyer-mediator had been asked to mediate a case for a party whom he had earlier represented in a simple divorce. In the second scenario, another family lawyer-mediator was asked to mediate a case for a party who had earlier interviewed the lawyer-mediator regarding legal representation. In both scenarios, the question was whether Standard VII.C would permit the lawyer-mediator to conduct the mediation? Ms. Seigle added that she had asked Mr. Long to participate in her Committee's discussion given that he was a family lawyer. Mr. Long noted that he felt the AO, which would bar the lawyer-mediator from mediating in either situation, would fall disproportionately hard on more rural family attorneys and mediators who work in districts where there is a smaller client pool. As such, he had proposed revising Standard VII.C to permit parties to waive such conflicts. Judge Cash noted this is a real world question which can be resolved with a knowing, intelligent waiver. Judge Tyson noted that judges can hear some cases where they had some previous involvement as long as there is a knowing, intelligent waiver. Ms. Seigle said she understands the view Mr. Long articulated, but asked whether the revising the Standard to include a waiver would invite parties to make complaints about conflicts of interest. Mr. Long noted that there has to be full disclosure. Ms. Nesbitt suggested that perhaps the Commission should develop a waiver form. Ms. Seigle noted that the Committee was only bringing the matter forward today to seek input from the Commission. She noted that her Committee would continue to consider these scenarios and asked Mr. Long to work with them. Mr. Little suggested that the first paragraph of Standard VII.C is indecipherable and should be reviewed as well.

Ms. Seigle next called attention to AO 37. She explained that a family lawyer-mediator had asked her Committee to consider whether evidence of offers made and rejected in mediation could be used later in the same action to support a motion for attorney's fees. She noted that proposed AO 39 clarified that G.S. § 7A-38.4A prohibited the introduction of such evidence. Ms. Nease Brown noted that the opinion did not touch on

Standard III, Confidentiality, and said she thought such a reference should be included. AO 39 was adopted with revisions to the last paragraph and the inclusion of a reference to confidentiality.

Ms. Seigle next called attention to proposed AO 36. She explained that two mediators had each sought an AO following mediations that impassioned and raised similar confidentiality concerns post-mediation. Following impasse, new attorneys were hired in both cases by parties who had participated in the mediations. (In Scenario #1, the original attorney had been fired and a new one hired; in Scenario #2, a pro se party had hired a lawyer post-mediation.) The new attorneys had contacted the mediators and asked to be briefed regarding what happened in mediation. Both mediators, Ms. Seigle continued, were concerned that such conversations would violate Standard III, Confidentiality. Ms. Seigle added that proposed AO 36 validated the mediators' concerns in that it provided that Standard III would prohibit such conversations. She opened the floor to discussion. Judge Cash wondered whether this should be a waivable matter. He agreed such conversations would violate Standard III, but questioned whether the Standard should be revised. The Commission voted to adopt AO 36 as submitted.

Ms. Seigle next called attention to AO 37 on gifts. She explained that a mediator had asked whether she could financially sponsor a CME/CLE program and have her sponsorship noted in registration materials or posted on a sign. The same mediator had also asked about sponsoring a dinner or open bar and having that contribution noted as well. Judge Tyson commented that lobbyists can provide food and drink to legislators without violating the gifts ban as long as that food and drink are for immediate consumption at events. Ms. Seigle responded that since the Commission prohibited the giving of mouse pads, pens, coffee mugs and the like, she did not feel comfortable suggesting that buying food and drinks was permissible. She added that permitting such would be tantamount to favoring more affluent mediators. AO 37 was adopted as submitted.

Ms. Seigle next briefly reported for the Criminal Subcommittee. She indicated that Mountain Mediation would be joining the ranks of community mediation centers participating in the DCC Mediation Program. She also reported that a new form was being used, AOC-CR-701, waiver of dismissal fee.

Mr. Long next reported for the Mediator Certification and Training Committee. He noted that the Committee had approved two new CME offerings this quarter, one to be held in Greensboro and the other in Charlotte. He added that a 24-hour DCC training package submitted by One Step Further in Greensboro had also been approved. Next, he noted that a trainer applicant had asked the Committee to consider whether a CME offering could be incorporated into a 40-hour training program. The Committee agreed to allow this, noting that the presence of seasoned mediators at rule and ethics discussions could benefit trainees and that such an approach could also help make CME more widely available. He added that permission came with two caveats: 1) to minimize disruption, there could be no more than one CME offered per 40-hour training program and 2) the cap on attendance would be waived only for the CME portion. Mr. Long reported that renewal materials for mediators and trainers were being updated for 2018/19 and new downloadable certificates would be available for those who renewed. Ms. Robinson passed around samples of the certificates noting they were designed by AOC graphic artist Jodie Lanning.

In Mr. Clare's absence, Ms. Wood reported for the New Media Committee. She noted that Ms. Ratliff had already provided some information about the new website and she asked Ms. Robinson to play the introductory video which will appear on the Commission's landing page. Next, Ms. Wood asked Ms. Robinson to display some of the recent activity on its Twitter page. Both Ms. Ratliff and Ms. Wood thanked Ms. Robinson for taking the lead on tweeting for the Commission and noted she was doing a great job. Next, Ms. Wood talked about efforts being undertaken this renewal period to combat the spamming and phishing that occurred last year: 1) that Mediator Profiles were being edited by AOC IT staff to make it harder to troll the site for

information, 2) that DRC staff would be working with AOC Security staff to develop a short video to educate mediators about spamming and phishing, and 3) that renewal materials would also seek to educate mediators and to remind them that they may remove their email address from public view if they wish. Ms. Ratliff added that DRC and AOC staff are working hard to ensure that all three of the above items are implemented in time for the 2018/19 renewal period. Lastly, Ms. Wood reported that the Committee was very sorry to lose Scott Sutton who had relocated to New Orleans. She noted how much his efforts had benefitted the Commission in launching its social media platforms.

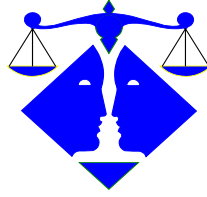
Ms. Dollar next reported for the Committee on Long Range Planning. She pointed out materials in the packet which catalogued dispute resolution processes and programs available in NC. She asked members to let her know if they had ideas for programs or other outreach the Commission could explore that might expand its footprint. She added that the Committee had met this quarter and determined to focus on mandatory certification of FFS mediators.

Ms. Hicks reported for the Staffing and Funding Committee. She reported that 14 applicants had applied for the Executive Director position and she had made arrangements to interview 7, but one had dropped out. She had conducted interviews of the remaining 6 and was waiting for guidance from Judge Webb as to how he wanted to proceed. She said she was extremely pleased with the quality of all the applicants.

Next, Ms. Dollars asked for Liaison Reports. Ms. Leazer reported for the NC Court Managers Conference, noting that they had just held their conference. She thanked Judge Cash for participating. She called attention to the results of a survey intended to gauge court staff interest in a mentoring program for new court staff. She noted that few court staff had responded to the survey, but most were likely away at the conference. She noted that Ms. Craig would likely be the point person on this project and would work with Commission staff to get mentors assigned to new court staff. Ms. Nease Brown reported for the Section that Nancy Norelli would be its new chair. She also reported that the Section would be creating videos to serve as MSC/FFS Rule 8 observation opportunities. She added that Ann Anderson and Jackie Clare were developing scripts. She noted that the Section's Annual Meeting had been well-attended. Mr. Igou added that the Section has resisted going from a newsletter to a blog format, but was in the process of doing so now. Mr. Schafer announced that the Industrial Commission's annual conference would be held October 10-12, 2018. Judge Tyson had no report for the Court of Appeals Mediation Program.

Ms. Robinson noted upcoming meeting dates: September 21, 2018; November 16-17 at Shell Island for the retreat; January 18, 2019; and May 17, 2019. She said she would soon be sending out reservation materials for the retreat and that a code would be required to register.

There being no further business, Ms. Dollar thanked everyone for attending and adjourned the meeting.



Dispute Resolution Commission MINUTES

**Friday, February 2, 2018
NC Judicial Center, Raleigh NC
10:00 AM**

Members present: Webb, Caldwell, Clare, Dollar, Evans, Farris, Hicks, Marcilliat, McCullough, Nease Brown, Ponton, Seigle, Tyson and Wood. Ex-officio members and staff present: Estle, Laney, Leazer, Nesbitt, Ratliff, Schafer, Sutton, and Robinson. Guests present: Steven Barbara, Kinsley Craig, Tara Kozlowski, Mark Riopel, Heidi Risser, and Ketan Soni.

Judge Webb welcomed everyone. He introduced new members, Judge John Tyson and Judge William Farris and recognized guests. Judge Webb noted that some of the guests present were there to talk about a proposed request for an Advisory Opinion (AO).

Judge Caldwell administered the oath to new member Chief District Court Judge William C. Farris (District 7) and to members who had been re-appointed: Judge Webb, Ms. Seigle, Ms. Hicks, and Mr. Clare. Next, Judge McCullough administered the oath to his friend and former colleague, Judge John M. Tyson of the NC Court of Appeals. Ms. Ratliff reported that the SEC had found no conflict of interest and no potential for a conflict with regard to either Judge Tyson or Judge Farris. Lastly, Judge Webb recognized retiring member Judge Doug McCullough for his service to the Commission. He thanked Judge McCullough and presented him with a plaque.

Judge Webb called for approval of the September minutes which were approved as submitted. Judge Webb reported for the Executive Committee that Judge Warren had authorized a Temporary Tech position for the Commission.

Judge Webb asked Ms. Ratliff for her office report. She first called attention to her November 5, 2017, memo on the creation of the Commission's Deputy Director position and the hiring of Harriet Hopkins. She also called attention to the documents attached to the memo and to Mr. Little's October 30, 2017, letter to the Committee on Staffing and Budget. Ms. Ratliff said she intended to incorporate these documents in these minutes and to post them in an effort to create a record in these matters. She noted that Ms. Hopkins' last day was October 16, 2017.

Ms. Ratliff continued her report by noting that staff wrapped-up the 2017/18 renewal period in mid-November. She indicated it was a lengthy and difficult renewal due to mediator confusion over the new CME requirement (despite receiving repeated notices) and a problem with spamming and phishing that resulted in many calls and emails from mediators to staff. She noted that renewals were down significantly and the Commission had lost 183 mediators, resulting in nearly a \$27,000 financial loss for the Commission. Ms. Ratliff called attention to a survey Ms. Dollar had done on why mediators had not

renewed. Judges McCullough and Tyson noted that CME was the reason most often cited by mediators for not renewing followed by retirement and lack of mediation work.

In response to Ms. Nease Brown's request for a more user-friendly budget report, Ms. Ratliff called attention to the "Comparison of Budget Reports" which had been distributed this morning. She asked members to let her know if they had suggestions for further refining the budget report and noted that, in the future, this document would be updated and distributed along with the AOC Budget Report at the end of each fiscal year.

Ms. Ratliff next reported on the success of Conflict Resolution Week in North Carolina, October 15-21, 2017, a joint project of the Commission and Dispute Resolution Section. In connection with that event, she reported there had been a well-attended reception with the Chief Justice and that proclamations had been issued by both the Chief Justice and Governor. She noted also that Representative Cynthia Ball had read both proclamations into the record at the General Assembly. Lastly, she noted three Webinars had been held and she singled out and praised Messrs. Soni and Sutton for their help with the Webinar on online mediation. Ms. Ratliff added that that immediately following Conflict Resolution Week, she and Ms. Dollar had attended a SE Regional ADR Conference in Charleston, SC. She distributed a copy of the agenda for the conference, noting that both she and Ms. Dollar had been presenters.

Ms. Ratliff next reported that she had been very busy with District Criminal Court Mediation Program matters this quarter, including two training applications. She noted also that she would likely need to devote most or all of February to editing the Commission's website.

Lastly, Ms. Ratliff reported that former Commission member Barbara Ann Davis of Leicester, NC had died. Ms. Ratliff noted that Ms. Davis had been a member of the Commission from 1999-2003 and had served as chair of the Mediator Certification and Training Committee.

Judge Webb next called on Ms. Nesbitt to report for the Ad hoc Clerk Mediation Program Committee. She reported that materials had been prepared for pilot site clerks, including a benchmark, forms, and a flowchart. She noted that the Clerks were ready to launch the pilot. Ms. Nesbitt next reported on caseload statistics. She noted that civil filings had been flat the past few years. She expressed concern as to how few cases were referred to mediation by clerks and noted that was the reason for the pilot. She noted that the arbitration program enjoys a very high success rate with no trial de novo sought in 87% of cases arbitrated. She added that referrals to arbitration are up.

Mr. Laney gave his legislative report. He explained that, during the last legislative session, the Commission proposed assessing an administrative fee of mediators and complaining parties when they failed to attend a hearing without good cause. The legislature had been unwilling to enact such a revision without a cap. He presented information about the cost of previously held appeals and proposed the administrative fee be capped at \$2000. Judge Evans asked about the cost of mailing notices and printing notebooks. She suggested the fee be closer to \$2500. Judge Webb called for a vote and a \$2500 cap was approved. Ms. Dollar reported that Ryan Boyce and Jonathan Harris would be serving as the Commission's legislative contacts while Mr. Murray was deployed.

Mr. Clare reported for the New Media Committee. He introduced Steven Barbara, AOC Chief Security Officer. In response to spamming and phishing problems that occurred this renewal period, Mr. Barbara gave a presentation on email security. Mr. Barbara offered to provide training to help mediators identify fraudulent emails. Judge Webb suggested that staff send an email to mediators notifying them

of the problems and suggesting they consider removing their email addresses from the Mediator Profile. Ms. Robinson noted that the Profile allows a mediator to withhold his/her email address from public view. Mr. Barbara suggested other more technical ways the Commission could secure its website, but noted further programming and cost would be required. Judge Webb added that the new Tech would assist with this project. Judge Webb asked that members share their ideas regarding the website, its design, and security issues with staff. Lastly, Judge Webb called attention to photos of the reception that were looping before the meeting started. He said he was pleased with the New Media Committee's use of Twitter and wants the Commission to have a growing online presence.

Judge Webb next called on guest Ketan Soni to give a presentation on UNC Charlotte's proposal to host a Regional Intercollegiate Mock Mediation Tournament in April, 2019. Mr. Soni noted that the professor leading the effort to bring the tournament to North Carolina, Dr. Vivian Lord, was seeking the Commission's endorsement. He explained that she hoped the Commission would help with publicity and that Commission members and certified mediators would serve as judges. He clarified that the tournament is open to both undergraduate and law students. The Commission indicated that it would be willing to help with announcements and would encourage members and mediators to offer assistance as judges. The Commission indicated that it looked forward to learning more about the event.

Judge McCullough reported for the Mediator Certification and Training Committee. He first called attention to CME offerings and noted he was pleased that so many sponsors had stepped up. He added that two new CME programs had been approved this quarter. Judge McCullough next noted that an applicant had observed a mediation this quarter which did not satisfy MSC Rule 8.C. Staff asked the applicant to observe another mediation and the applicant sought a waiver from the Committee under Rule 8.C. Judge McCullough reported the Committee did not grant the waiver and advised the applicant that she must strictly comply with the Rule. Judge McCullough next reported that the Committee had considered the question of whether, for purposes of MSC Rule 8.C(3), a COA judge holding inactive MSC certification could be observed mediating a COA case by an MSC certification applicant. The Committee responded "yes", but only as to COA mediations. The inactive mediator COA judge could not be observed mediating MSC cases. Ms. Ratliff reported that a new MSC trainer, Ellen Gelbin working through and with Wake Forest Law School, had begun to train this quarter. Judge McCullough noted this concluded his final Committee report to the Commission and that he would miss participating and wished the Commission well.

In Judge Vincent's absence, Judge McCullough gave the report for the Grievance Committee. He first reported that an appeal scheduled to be heard on December 7, 2017, had been withdrawn. He described the applicant involved as a Florida lawyer with a significant disciplinary history, including two suspensions of his Florida law license and an admonishment. Judge McCullough added that the applicant had entered into a stipulation with the Florida Bar wherein his license was reinstated, but he was placed on a 2-year probationary period beginning January 1, 2017. The Committee denied the application given the applicant's disciplinary history and the fact that he was still on probation and the applicant appealed to the full Commission. Judge McCullough reported that the Commission's attorney, Assistant AG Kathryn Shields, had spoken with the applicant and they had agreed that he would withdraw the appeal.

Next, Judge McCullough reported that the Committee had issued a Letter of Warning to an FFS mediator who had repeatedly continued a mediation date for a wife who had advised the mediator that she intended to seek a determination of indigency. The mediator made no effort to inform the wife of AOC-

CV-828 (Petition for Relief from Obligation to Pay All or Part of Mediator's Fee in FFS case). The Committee found that the mediator's conduct violated FFS Rule 6.B(5) in that the mediator failed in her duty to conduct the conference, FFS Rules 7.E and 8.H in that the mediator failed to serve an indigent party, and Standard VII in that the mediator put her own financial interests above those of the party. Judge McCullough added that, based on this situation and other recent disciplinary matters involving parties claiming indigency, the Grievance and SAO Committees had met jointly to consider whether there was a need to clarify MSC Rule 7.D and FFS Rule 7.E. Judge McCullough noted that the mediator issued the Letter, had complained that Rule 7.E was unclear and cited language in the Rule which, she contended, permitted her to postpone indefinitely. Judge McCullough indicated Ms. Seigle would have more to say about this later. He added that Ms. Dollar has also suggested that the Committees reach out to court staff in an effort to educate them about the indigency rules and the need to avoid the delay caused by repeated continuances.

Next, Judge McCullough noted that the Grievance Committee had approved two certification applications this quarter which raised conduct issues (an FFS applicant had two dated misdemeanors and another FFS applicant's law license had been suspended for three years, but the suspension was stayed and the matter was dated with the mediator having no further problems). Lastly, Judge McCullough reported that one formal complaint was pending against an MSC mediator and staff was now investigating.

Ms. Seigle gave the report for the Standards and Advisory Opinions Committee. She noted first that there had been a comment on proposed AO 35 which had been tentatively approved at the fall retreat. The mediator commenting suggested replacing the "may" in the last paragraph of the opinion with "shall". Ms. Seigle reported that the Committee determined to leave the AO as it was in the interest of giving mediators wider latitude. She asked for final approval of AO 35 and AO 34 on which there was no comment. Both AOs were given final approval.

Ms. Seigle next reported that the SAO and Grievance Committees had jointly determined to propose revisions to MSC Rule 7.D and FFS Rule 7.E. She noted that the Committees believed these rules were confusing as written and lacked references to the forms developed to implement them, i.e., AOC-CV-814 and AOC CV-828. As such, they did little clarify matters for self-represented parties. Moreover, Ms. Seigle reported that the Committees could discern no reason for differences between the two rules, i.e., the MSC Rule provided for a party to seek a determination of indigency only after the mediation was conducted whereas the FFS Rule provided for the determination to be made either before or after the conclusion of the conference. Ms. Seigle explained that the revisions proposed by the Committees were intended to: clarify the rules, make them more user friendly by inserting form numbers, and provide for uniformity. She noted that it was unusual for the SAO or Grievance Committee to propose rule changes, but that they had taken on this project because each had significant exposure to the indigency rules through complaints and the drafting of AOs. She called for a vote on the revisions and they were approved. Ms. Ratliff was asked to post them for comment. Judge Webb indicated that a final email vote could follow in an effort to get previously approved matters before the Supreme Court this spring. Ms. Seigle next noted proposed revisions to AOC-CV-814 and AOC CV-828, forms implementing MSC Rule 7.D and FFS Rule 7.E. She explained the form revisions tracked the rule changes noted above. The forms were approved as revised. Ms. Ratliff indicated the forms would go before the AOC Civil Forms Committee once the Supreme Court approved the Rule 7 changes.

Next, Ms. Seigle called attention to proposed AO 36. She explained the Grievance Committee had requested the AO after issuing a Letter of Warning to an MSC mediator in 2016 for violating MSC Rule

7.D, the indigency rule. She described the AO as having two purposes: 1) to alert mediators to the Public Records Disputes Act which incorporates the MSC Rules, Standards, and DRC Rules and 2) to remind mediators of their obligation to serve indigent parties. She called for a vote on AO 36 and it was adopted without change. Ms. Ratliff was asked to post it for comment. Ms. Seigle noted that the Committee was also considering reissuing/recirculating AO 27 in light of the Letter of Warning issued to an FFS mediator this quarter. She noted that the Committee believed it might be more efficient to reissue/recirculate the AO rather than draft a new one on the same topic, i.e., the obligation of FFS mediators to serve indigent parties. The Commission indicated it had no concerns about the Committee reissuing the Opinion. Ms. Seigle next noted that AO 19 will need to be revised or withdrawn assuming the Supreme Court adopts the proposed revisions to FFS Rule 7.E approved by the Commission today. Lastly, Ms. Seigle noted that there are four requests for AOs currently pending before her Committee.

Ms. Seigle reported for the Criminal Subcommittee. She observed that the Committee was interested in promoting uniformity among community mediation centers participating in the District Criminal Court Mediation Program. She added that the matter of court-issued mediator badges had come up and she intended to speak to participating centers about it.

Ms. Hicks reported for the Civil Subcommittee, noting that members had met during the lunch hour to consider an issue raised by a mediator with Commission staff. The mediator told Commission staff that court staff had advised him that his local judges would no longer finalize, i.e., execute, mediation agreements signed by the parties and their attorneys. Ms. Hicks reported that the Committee had asked Ms. Ratliff to speak with the Chief District Court Judge about the matter. If the matter can't be resolved informally, she added that the Committee will consider the need for a rule change as suggested by the mediator.

Ms. Hicks next reported for the Staffing and Funding Committee. She reported that this Committee had a very productive initial meeting. She said the Committee was seeking permission to put together an announcement and post Ms. Ratliff's position. She noted the Committee would like to fill the position by June 1 with Ms. Ratliff working through the end of August. She reported that Ms. Hopkins, already an experienced mediator, had indicated that it took her about four months to feel comfortable fielding questions. Judge Webb asked the Commission to allow Ms. Hicks and her Committee to develop a position description and announcements and to post them as necessary to move forward with the hiring process. The Commission agreed. Ms. Hicks reported that the Committee will be advertising the Executive Director position at $\frac{3}{4}$ time. Once a new Executive Director is hired, the Committee will work with that person to possibly add another administrative or paraprofessional position.

As for funding, Ms. Hicks reported that her Committee proposed adding a \$50.00 processing fee to MSC and FFS applications. She explained that staff often spend a considerable amount of time on applications that are ultimately denied with no application fee forthcoming. The Commission decided that if an applicant applies for certification within one year of training, s/he would get a \$10.00 discount on the \$50.00 processing fee. This might, they thought, help with dated training issues. The Commission agreed to the imposition of this fee beginning with FY 2018/19. The fee would apply not only to new applications, but to ones filed by lapsed mediators. Next, Ms. Hicks reported that the Committee was recommending that the \$200 annual MSC/FFS trainer fee be eliminated in favor of a \$10.00 per participant fee, excluding law students. Ms. Seigle noted that she thinks this will result in additional revenue. This new fee will be effective with the start of FY 2018/19. Ms. Hicks reported that the Committee was also recommending that all FFS mediators be required to be certified.

Ms. Dollar reported for the Long Range Planning Committee. Because the meeting had run long, she said she would save the materials she circulated for this meeting for the spring meeting. She asked everyone to review the memo on ADR programs and processes already available in NC and to give her their ideas for expanding the Commission's mission.

Judge Webb next called for Liaison Reports. Ms. Nease Brown reported for the Dispute Resolution Section calling attention to her memo dated January 10, 2018. The memo, she noted, described a project that the Section was considering undertaking, i.e., to develop a video or videos that could serve as an observation(s) for purposes of MSC/FFS Rule 8. She noted that observations are an important part of training, but are difficult to arrange. Moreover, cases sometimes settle pre-mediation, a mediation may be of very short duration, or the mediator observed may be ineffective. She suggested that substituting a well-crafted video, salted with ethical and other issues, may be a more effective learning tool than an actual observation. She noted that Jackie Clare and Ann Anderson had agreed to serve on a committee to develop videos. Ms. Nease Brown asked whether the Commission is willing to consider this option. Mr. Sutton asked whether there were already videos available such that the Section would not have to start from scratch. Ms. Nease Brown indicated she thought it preferable to have videos that addressed NC program rules and standards. Ms. Nesbit asked how the Commission could be sure that mediators watched the video. It was suggested there were ways to address that concern. The Commission indicated it was open to the idea. Ms. Nease Brown reminded everyone of the Section's upcoming annual meeting on March 16, 2018, in Pinehurst.

Ms. Estle reported that Jennifer Plaster (Conflict Resolution Center of Cabarrus County) had been elected the Mediation Network's new President and changes were coming. Mr. Laney indicated he had no report for the 4th Circuit Appellate Mediation Program. Ms. Leazer reported for the NC Judicial Support Staff Conference and Conference of Court Administrators had merged to form the NC Conference of Court Managers. She added that she has been working with Ms. Ratliff to develop a survey to begin to implement a mentoring effort for court staff. She noted that, assuming court staff express interest in a mentoring program and are willing to serve, things will get underway. She noted that she is already beginning to see a lot of turnover in court staff. Judge Tyson reported that Judge Arrowood has completed mediator training and that other COA judges are scheduled to take the training.

Judge Webb asked about upcoming meeting dates. Commission members favored May 4 or May 18. Possible fall retreat locations mentioned were Shelton Vineyard, the Waynesville Inn, Shell Island at Wrightsville Beach, and Sea Trail at Sunset Beach. September 14, 21, and 28 were mentioned as possible retreat dates. Commission members also favored an early January meeting. Judge Webb asked Ms. Robinson to circulate possible dates within the parameters mentioned and to look into some of the retreat locations suggested. There being no further business, Judge Webb adjourned the meeting.